A

Public Prosecutor v Soha Beta & Anor

B HIGH COURT (MIRI) — CRIMINAL TRIAL NO MYY-45B-2/7 OF 2014
MAIRIN IDANG JC
1 NOVEMBER 2018

C *Criminal Law — Murder — Common intention — First accused and second accused charged under s 302 read together with s 34 of the Penal Code for allegedly asphyxiated their own new born baby with intention to kill — Unsworn statements by accused — Whether there was cautioned statement tendered by accused — Whether accused were last persons with the baby — Whether prosecution proven case beyond reasonable doubt against accused — Whether there was common intention — Whether there was pre-concert or pre-planning — Penal Code ss 34 & 302*

D

E *Evidence — Statement — Unsworn statement — First accused and second accused charged under s 302 read together with s 34 of the Penal Code — Accused gave unsworn statement — Weight attached to unsworn statement — Whether there was cautioned statement tendered by accused to support accused's defence*

F Soha Beta ('the first accused') and Herna Molla ('the second accused') were charged under s 302 of the Penal Code ('the Code') read together with s 34 of the Code ('the said charge'). The prosecution's case was that both the accused in furtherance of their common intention had asphyxiated their own new born baby by burying him alive on 26 November 2013 at Ladang Alamwasa with the intention to kill him. The prosecution relied on the evidence of the security

G guard employed by Alamwasa Plantation Sdn Bhd ('PW13') who saw and recognised the first accused together with a female person carrying something in a 'kain sarong batik' entering Ladang Alamwasa Sdn Bhd from the main road and then made a right turn to the bushes but when they came out from the bushes, they no longer carried anything. At the end of the prosecution's case,

H the court found that the baby was already dead when buried. Consequently, the court had discharged and acquitted both the accused on the charge of murder under s 302 of the Code. The court nevertheless found that there was a prima facie case against the accused for offence under s 318 of the Code. On appeal by the prosecution, the Court of Appeal remitted the case back to the High Court

I with an order that both the accused were to be called upon to enter their defence on the original charge of murder. Both the accused chose to give unsworn statement from the accused dock. The second accused's unsworn statement was that the first accused had told her that they had to give the baby for adoption but when the second accused refused, the first accused had taken

the baby by force leaving the second accused crying. The first accused then disappeared and returned after 20 minutes and told the second accused that an Indonesian couple had adopted the baby. Basically, the defence raised by both the accused was that they had given the baby to the Indonesian couple for adoption and having done so they did not know what happen to the baby. The accused had also raised the issue related to the defects in the ID Parade. Further, in their alibi, the accused were saying that at the time of the alleged offence around 3.30pm on 26 November 2013, they were in a bus on the Miri-Bintulu Road somewhere after Simpang Ngu junction. However, the prosecution submitted that the defence of alibi raised at the defence stage was a classic example of afterthought and recent invention of evidence because the investigating officer had testified at the prosecution stage that it was for the first time he heard of the baby being given for adoption.

Held, convicting the first accused as per the said charge and sentencing him to death; and acquitting and discharging the second accused of the said charge:

(1) On reading the second accused's unsworn statement, it was the first accused who told the second accused that they had to give the baby for adoption. But the court's concern was that the first accused's statement that the baby was given for adoption was made in the unsworn statements. The court would have preferred a statement to that effect in the first accused's cautioned statement. It has been held that an exculpatory cautioned statement represents an accused person's first disclosure of his defence while under investigation. If it contains the necessary particulars that support his innocence, the cautioned statement is the accused's '*Alcontara* notice' and it carries great weight. Investigation must be carried out on the disclosure and the onus is shifted to the prosecution to rebut the same. But there was no cautioned statement tendered here which would support the alleged adoption of the baby by the Indonesian couple (see para 30).

(2) The court agreed with the prosecution that the accused were the last persons with the baby only from the time of the discharged from Miri General Hospital and whilst in the bus up to Simpang Ngu at Niah. Both unsworn statements of the accused supported this view. But having alighted from the bus, the first accused had taken the baby by force from the second accused. The first accused then disappeared for a good 20 minutes. The court was of the view that the first accused was the last person to be with the baby for the duration of the 20 minutes (see para 31).

(3) During the ID parade, PW13 had identified the male person as the first accused but not the female person. PW13 also identified the first accused at the dock but not the second accused. PW13's evidence was that he could see the first accused's face clearly. In fact, PW13 saw the two

persons emerging from the main road until they turn right and went to the bush. The court was of the view that PW13 had some good observation of the two persons and it was not a case of a fleeting glance. Even if the ID parade conducted was unsatisfactory or that it did not follow the guidelines, the court could still rely on the dock identification. In respect of the alibi, the court was entirely in agreement with the prosecution's submission that the alibi of the accused was an afterthought and of no help to the accused (see paras 32–33 & 42).

(4) The prosecution had proven its case beyond reasonable doubt that it was the first accused and the female person that had killed the baby. As for second accused, though her DNA was found on the clothing, that was to be expected after all she was the baby's mother and she had touched and cuddled her baby. From her unsworn statement, she did not want to give her baby for adoption and the first accused had to take the baby by force. She was left alone crying until the first accused came back no longer with the baby. The court found that the second accused was not the female person with the first accused at the crime scene. PW13 did not identify her at the crime scene or at the ID parade and during dock identification (see para 43).

(5) The prosecution had not proven common intention. There was no evidence showing the existence of pre-concert or pre-planning bearing in mind that the crucial test was that such plan must precede the act constituting an offence. For the above reasons, the defence put forward by the first accused had failed to create any reasonable doubt in the prosecution's case but the prosecution had succeeded in proving its case against the first accused as per the charge beyond reasonable doubt at the end of the defence case (see paras 46–47).

[Bahasa Malaysia summary

Soha Beta ('tertuduh pertama') dan Herna Molla ('tertuduh kedua') didakwa di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun ('pertuduhan tersebut'). Kes pendakwaan adalah kedua-dua tertuduh dengan niat bersama mereka telah melemaskan bayi mereka yang baru lahir dengan menanamnya hidup-hidup pada 26 November 2013 di Ladang Alamwasa dengan niat untuk membunuhnya. Pihak pendakwaan bergantung kepada keterangan pengawal keselamatan yang bekerja dengan Alamwasa Plantation Sdn Bhd ('PW13') yang melihat dan mengenali tertuduh pertama bersama seorang wanita yang membawa sesuatu dalam kain sarong batik memasuki Ladang Alamwasa Sdn Bhd dari utama jalan dan kemudian membelok kanan ke semak tetapi apabila mereka keluar dari semak, mereka tidak lagi membawa apa-apa. Pada akhir kes pendakwaan, mahkamah mendapati bahawa bayi itu sudah mati apabila dikebumikan. Akibatnya, mahkamah telah melepaskan dan membebaskan kedua-dua tertuduh atas pertuduhan membunuh di bawah s 302 Kanun. Walau bagaimanapun, mahkamah mendapati terdapat kes prima

facie terhadap tertuduh kerana kesalahan di bawah s 318 Kanun. Atas rayuan oleh pihak pendakwaan, Mahkamah Rayuan mengembalikan semula kes itu ke Mahkamah Tinggi dengan perintah bahawa kedua-dua tertuduh dipanggil untuk membuat pembelaan mereka atas pertuduhan pembunuhan yang asal. Kedua-dua tertuduh memilih untuk memberi pernyataan tidak bersumpah dari kandang saksi. Pernyataan tidak bersumpah tertuduh kedua adalah bahawa tertuduh pertama telah memberitahunya bahawa mereka harus memberi bayi itu untuk pengambilan anak angkat tetapi apabila tertuduh kedua enggan, tertuduh pertama telah mengambil bayi itu secara paksa meninggalkan tertuduh kedua menangis. Tertuduh pertama kemudian hilang dan kembali selepas 20 minit dan memberitahu tertuduh kedua satu pasangan Indonesia telah menerima bayi tersebut. Pada dasarnya, pembelaan yang dibangkitkan oleh kedua-dua tertuduh adalah bahawa mereka telah memberikan bayi itu kepada pasangan Indonesia untuk pengambilan anak angkat dan dengan itu mereka tidak tahu apa yang terjadi pada bayi tersebut. Tertuduh juga telah membangkitkan isu yang berkaitan dengan kecacatan dalam perbarisan pengecaman. Selain itu, dalam alibi mereka, tertuduh mengatakan bahawa pada masa kesalahan yang didakwa pada pukul 3.30 petang pada 26 November 2013, mereka berada di dalam bas di Jalan Miri-Bintulu mana-mana selepas Simpang Ngu. Walau bagaimanapun, pihak pendakwaan telah mengemukakan bahawa pembelaan alibi yang dibangkitkan di peringkat pembelaan adalah contoh klasik tentang pemikiran semula dan perekaan keterangan baru kerana pegawai penyiasat telah memberi keterangan pada peringkat pendakwaan bahawa adalah untuk pertama kalinya dia mendengar tentang bayi yang diberikan untuk pengambilan anak angkat.

Diputuskan, mensabitkan tertuduh pertama mengikut pertuduhan tersebut dan menjatuhkan hukuman mati; dan membebaskan dan melepaskan tertuduh kedua dari pertuduhan tersebut:

(1) Semasa membaca pernyataan tidak bersumpah oleh tertuduh kedua, tertuduh pertama yang memberitahu tertuduh kedua bahawa mereka terpaksa memberi bayi untuk pengambilan anak angkat. Tetapi kekhuatiran mahkamah adalah bahawa kenyataan tertuduh pertama bahawa bayi itu diberikan untuk pengambilan anak angkat dibuat dalam pernyataan tidak bersumpah. Mahkamah akan memihak satu kenyataan kepadanya dalam pernyataan beramaran tertuduh pertama. Telah diputuskan bahawa pernyataan beramaran yang membebaskan tertuduh dari tuduhan menggambarkan pendedahan pertama tertuduh tentang pembelaannya ketika di bawah siasatan. Sekiranya ia mengandungi butir-butir yang perlu untuk menyokong ketakbersalahannya, pernyataan beramaran adalah 'notis *Alcontara*' tertuduh dan ia membawa berat yang besar. Siasatan perlu dijalankan ke atas pendedahan itu dan tanggungjawab itu dialihkan kepada pihak pendakwaan untuk mematahkannya. Tetapi tiada pernyataan beramaran yang ditender di

sini yang akan menyokong dakwaan pengambilan anak angkat bayi tersebut oleh pasangan Indonesia (lihat perenggan 30).

(2) Mahkamah telah bersetuju dengan pendakwaan bahawa tertuduh adalah orang yang terakhir dengan bayi itu hanya dari masa yang dilepaskan dari Hospital Besar Miri dan semasa dalam bas sampai ke Simpang Ngu di Niah. Kedua-dua pernyataan tidak bersumpah tertuduh menyokong pandangan ini. Tetapi setelah turun dari bas, tertuduh pertama telah mengambil bayi itu dengan kekerasan dari tertuduh kedua. Tertuduh pertama kemudian hilang selama 20 minit. Mahkamah berpendapat bahawa tertuduh pertama adalah orang yang terakhir dengan bayi itu selama tempoh 20 minit (lihat perenggan 31).

(3) Semasa perbarisan pengecaman, PW13 telah mengenal pasti lelaki itu sebagai tertuduh pertama tetapi bukan orang perempuan itu. PW13 juga mengenal pasti tertuduh pertama di kandang saksi tetapi bukan tertuduh kedua. Keterangan PW13 adalah bahawa dia dapat melihat wajah tertuduh pertama dengan jelas. Malah, PW13 melihat kedua-dua orang itu keluar dari jalan utama sehingga mereka membelok ke kanan dan pergi ke semak. Mahkamah berpendapat bahawa PW13 mempunyai beberapa pemerhatian yang baik terhadap kedua-dua orang dan ia bukan satu kes sekilas. Walaupun perbarisan pengecaman yang dijalankan tidak memuaskan atau tidak mengikut garis panduan, mahkamah masih dapat bergantung pada pengenalan kandang saksi. Berkenaan dengan alibi, mahkamah sepenuhnya bersetuju dengan hujahan pendakwaan bahawa alibi tertuduh adalah sesuatu yang difikirkan kemudian dan tidak membantu kepada tertuduh (lihat perenggan 32–33 & 42).

(4) Pihak pendakwaan telah membuktikan kesnya melebihi keraguan munasabah bahawa adalah tertuduh pertama dan orang perempuan tersebut yang telah membunuh bayi itu. Bagi tertuduh kedua, walaupun DNAnya ditemui pada pakaian, adalah dijangka memandangkan dia adalah ibu bayi dan dia telah menyentuh dan memeluk bayi tersebut. Dari pernyataan tidak bersumpahnya, dia tidak mahu memberikan bayi itu untuk pengambilan anak angkat dan tertuduh pertama terpaksa mengambil bayi tersebut secara paksa. Dia dibiarkan sahaja menangis sehingga tertuduh pertama tidak kembali dengan bayi itu. Mahkamah mendapati bahawa tertuduh kedua bukanlah orang perempuan yang bersama dengan tertuduh pertama di tempat kejadian. PW13 tidak mengenalinya di tempat kejadian atau di perbarisan pengecaman dan semasa pengenalan kandang saksi (lihat perenggan 43).

(5) Pendakwaan tidak membuktikan niat bersama. Tiada keterangan yang menunjukkan kewujudan *pre-concert* atau *pre-planning* mengambil kira bahawa ujian penting adalah bahawa rancangan itu harus mendahului perbuatan itu untuk menjadi satu kesalahan. Atas sebab-sebab di atas, pembelaan yang dikemukakan oleh tertuduh pertama gagal membuat

sebarang keraguan munasabah dalam kes pendakwaan tetapi pihak pendakwaan telah berjaya membuktikan kesnya terhadap tertuduh pertama mengikut dakwaan yang melebihi keraguan munasabah pada akhir kes pembelaan (lihat perenggan 46–47).]

Notes

For cases on common intention, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1886–1891.

For cases on unsworn statement, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3270–3271.

Cases referred to

Abdul Rashid bin Abdul Wahab v Pendakwa Raya [2016] MLJU 956; [2016] 1 LNS 1310, HC (refd)

Abu Bakar bin Imam Idris v PP [1947] 1 MLJ 133b (refd)

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73; [1998] 3 CLJ 597, FC (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2004] 1 LNS 517; [2005] 1 AMR 323, FC (refd)

Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)

Chang Kim Siong v PP [1968] 1 MLJ 36; [1967] 1 LNS 18, FC (refd)

Chukwudi Hassan lwn Pendakwa Raya [2015] MLJU 847; [2015] 8 CLJ 353, CA (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ Rep 101, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)

Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] CLJ 464; [1982] CLJ Rep 130, FC (refd)

Heng Aik Ren Thomas v PP [1998] 3 SLR 465, CA (refd)

Karam Singh v PP [1967] 2 MLJ 25; [1967] 1 LNS 65, FC (refd)

Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528, CA (refd)

Low Kian Boon & Anor v PP [2010] 4 MLJ 425; [2010] 5 CLJ 489, FC (refd)

Mohd Razaly Rahmad v PP [2014] MLJU 1921; [2015] 2 CLJ 574, HC (refd)

Muhammad Isa bin Aris & Anor v PP [2011] 5 MLJ 342, CA (refd)

Nanda Kumar K Kaliapan v PP [2015] 2 MLJU 2361; [2015] 2 CLJ 670, CA (refd)

Ong Poh Cheng v PP [1998] 4 MLJ 8; [1998] 4 CLJ 1, CA (refd)

Ouseng Sama-Ae v PP [2011] 4 MLJ 756; [2010] 6 CLJ 416, CA (refd)

Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)

PP v Cheah Chong Tatt & Anor [2017] MLJU 579, HC (refd)

PP v Ho Sek Kong [2006] 2 MLJ 81; [2006] 5 CLJ 49, HC (refd)

PP v Magendran a/l Mohan [2005] 6 MLJ 6; [2005] 3 CLJ 592, HC (refd)

A *Rex v Vincent Banka & Anor* [1936] 1 MLJ 53 (refd)
R v Turnbull [1976] 3 All ER 549, CA (refd)
Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)

Legislation referred to

B Penal Code ss 34, 302, 318

Musli AB Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.
Ranbir Singh (Ranbir S Sangha & Co Advocates) for the accused.

C

Mairin Idang JC:

[1] The accused here are Soha Beta and Herna Molla and they are charged as follows:

D

> Bahawa kamu pada 26 November 2013, jam lebih kurang 3.30 petang, bertempat di Lereng bukit, Jalan Ladang Alamwasa Sdn Bhd, Suai, Batu Niah, di dalam Daerah Miri, di dalam Negeri Sarawak, bagi mencapai niat bersama kamu telah membunuh seorang bayi lelaki (tiada nama), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan
E dibaca bersama seksyen 34 Kanun yang sama.

[2] The prosecution had called 20 witnesses. For the defence, both accused gave unsworn statements. For ease of reference and where appropriate I shall also refer to Soha Beta as A1 and Herna Molla as A2.

F

[3] At the close of its case, the prosecution submitted that the ingredients which it needed to prove are as follows:

(a) the baby of the accused had died;

G

(b) the baby of the accused had died due to asphyxia; and

(c) both accused in furtherance of their common intention had asphyxiated their own new born baby by burying him alive on the 26 November 2013 at Ladang Alamwasa with the intention to kill him.

H

[4] The brief facts of the case are these. A2 is the sister-in-law of A1, he being married to A2's elder sister. A1, his wife and A2 were all working in the same oil palm estate at Ladang Sawit SOP Plantation Suai. A1 and A2 had a consensual sex which led to the birth of a baby boy. A2 gave birth at the Miri General
I Hospital ('MGH'). Upon discharged from MGH, A1, A2 and the baby took a bus until it stopped at Simpang Ngu, Niah. A1 persuaded A2 to give the baby for adoption but she refused. Eventually A1 had to take the baby by force from A2. A1 then disappeared with the baby and after 20 minutes also came back to where he had left A2. A1 old A2 that he had given the baby to an Indonesian

couple. They then boarded a bus towards Ladang Sungai Pandan 4. Ladang Sungai Pandan 4 where they were arrested and subsequently charged for the murder of the baby.

[5] At the close of the prosecution case, the learned DPP submitted that a prima facie case had been made out and urged upon the court to call upon both accused to enter their defence. Learned counsel for the accused ('learned counsel') submitted otherwise and had called for the discharge and acquittal of both accused. I was reminded of the steps to be observed by the court at the close of the prosecution case, which had been summarised in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 (FC) and what constitute a prima facie case which had been described in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2004] 1 LNS 517; [2005] 1 AMR 323 (FC).

[6] What *Mohd Radzi* and *Balachandran* tell us are this. That in deciding whether there is a prima facie case, the court must subject the prosecution's evidence to a maximum evaluation to determine whether all the essential ingredients have been proven. In doing so the court is required to test, scrutinise and evaluate the prosecution's evidence thoroughly from all angles. It is also a test of credibility and reliability of the prosecution evidence.

[7] I read through the evidence adduced by the prosecution for the purpose of deciding whether there was a prima facie case, it was my finding that the prosecution had not proven ingredient 3, namely that 'both A1 and A2 in furtherance of their common intention had asphyxiated their own new born baby by burying him alive on the 26 November 2013 at Ladang Alamwasa with the intention to kill him'. I was of the view that the baby was already dead before he was buried at Ladang Alamwasa on the 26 November 2013 (the burial site). I made my finding after considering the evidence of PW13 (Titus Farneubun, the security guard employed by Alamwasa Plantation Sdn Bhd) and PW19 (Dr Jamil bin Dolkadir, the pathologist).

[8] I did not accept the evidence of PW13 where he allegedly heard the baby's cries after the accused had left the burial site some ten minutes also. I was of the view that the baby would die instantly upon burial, as such PW13 could not have heard the baby's cries after ten minutes. My view is supported by PW19's evidence that the baby could not have cried once buried. However, in ruling that the accused were involved in burying a dead baby, I took into account the presence of their DNA on the exhibits (green and white cloths printed with words 'UNTUK KEGUNAAN HOSPITAL SAHAJA' found wrapping the body of the baby underneath the soil) recovered from the baby. The chemist's report (P42) had shown the accused and the baby profiles were present in the exhibits recovered from the baby. This showed that both the

accused were the last persons to be with the baby from the time of A2 discharged from the Miri General Hospital up to the time of their arrest.

[9] As it was my view that the baby was already dead when buried, I then discharged and acquitted both accused on the charge of murder under s 302 of the Penal Code. However, it was my finding that there is a prima facie case against the accused under s 318 of the Penal Code and directed the learned DPP to frame a charge against both accused under s 318 of the Penal Code. But the prosecution appealed. The Court of Appeal ('COA') allowed the appeal and remitted the case back to the High Court with an order that both accused were to be called upon to enter their defence on the original charge of murder.

[10] At the continuation of trial on the 23 November 2017, learned counsel for the accused informed the court that he had briefed the accused (through an Indonesian interpreter, Mr Lucky Nugrahan passport No D037199) of the three options namely, to give sworn evidence from the witness box which means they would be liable to cross-examination by the prosecution or to give unsworn statement from the accused dock which means they would not be cross-examined or to remain silent. Both accused chose to give unsworn statement from the accused dock. Learned counsel also informed the court that the defence would not be calling any other witness. Learned counsel then tendered the accused's notice of defence of alibi which were marked as D1 and D2 respectively.

[11] Both accused had prepared written statements which were translated to English by the Indonesian interpreter, Mr Lucky Nugrahan:

A1's statement is as follows:

1. Herna Molla and I left Miri General Hospital with the baby after both were discharged from the hospital on 26 November 2013. We left the Hospital at about 12 midday. Our intention was to go back to our work place at Ladang Sawit SOP Plantation Suai. I had also paid the sum of RM1080.00 for the hospital charges. As we were on the journey home to the Plantation, I received a phone call from Tuan Michael who is one of the Manager at the Plantation. He asked if the baby that Herna gave birth to is mine or not. I admitted that the baby is mine due to the fact that we had a consensual affair. He then said that I am not allowed to go back to the Plantation because the other Indonesian workers were angry with me about the affair and the birth of the baby and that at the very least we would be beaten up.
2. We took a taxi to the Bus terminal at Miri and from there we took a bus bound for the Plantation at Suai the bus had stopped at Simpang Ngu, Niah. There I tried to convince Herna Molla that we had to give up the baby to any one at Simpang Ngu but she refused. I took the baby from her by force and went to another part of Simpang Ngu, Niah where there were

many stalls. I waited near the stalls for about 15 minutes while I tried to get anybody to take the baby. Finally, I met a couple that were Indonesian as well and I convinced them to take the baby and they did. After that I went back to where Herna Molla was standing and we both took another bus to a different Plantation which was known as Ladang Sungai Pandan 4, where we hoped to make a fresh start in the hope that nobody would know us and I also called my wife and told her to meet us at the new Plantation.

3. I did not bury the baby and kill the baby. At the time of the alleged offence which is about 3.30 pm on 26 November 2013, Herna Molla and I were in a bus on the Miri-Bintulu Road somewhere after Simpang Ngu junction and we were on our way to Ladang Sungai Pandan 4. Ladang Sungai Pandan 4 is the place where we were arrested and we had surrendered voluntarily.

That is all I have to say.

A2's statement is as follows:

1. I did have an affair with Soha Beta. I did not even know I was pregnant until I started having labour pains and only then I was told by the nurse at the Ladang Sawit SOP Plantation, Suai that I was pregnant. I was then taken to Miri General Hospital where I delivered the baby.

2. On 26 November 2013 at about 12 midday I was discharged with the baby and Soha Beta and I together with the baby took a taxi to the bus terminal from where we boarded a bus. Initially before boarding the bus we had intended to go back to Ladang Sawit SOP Plantation, Suai but then Soha Beta told me that the Indonesian workers there were threatening us and we then decided to go to another Plantation by bus. When the bus reached Simpang Ngu at Niah we got off the bus for what I thought would be a lunch break instead once we got off the bus Soha Beta told me that we had to give up the baby, I disagreed but he took the baby by force from me and then he went towards an area with many market stalls. I could not see him from the place where I was standing. I just waited there and cried. He came back after about 20 minutes and told me he had given the baby up for adoption to an Indonesian couple. Then we took a different bus towards a new Plantation which was known at that time as Ladang Sungai Pandan 4, where Soha Beta said we would find new jobs. Soha also made arrangements for my sister to join us at the place.

3. I had no part to play in the death or adoption of the baby. At the time of the alleged offence which is about 3.30 pm on 26 November 2013, Soha Beta and I were in a bus on the Miri- Bintulu Road somewhere after Simpang Ngu junction and we were on our way to Ladang Sungai Pandan Ngu junction and we were on our way to Ladang Sungai Pandan 4. Ladang Sungai Pandan 4 is the place where we were arrested and we had surrendered voluntarily.

That is all I have to say.

[12] At the close of the defence's case I directed both the prosecution and the

A accused to file their respective submissions concurrently on or before 8 December 2017 and to reply, if any, by the 15 December 2017. On the 29 January 2018 I delivered my decision where I found that the prosecution had proven its case beyond reasonable doubt that only A1 was involved in the death of the baby by burying the baby at the burial site. As for A2, the
B prosecution had not proven beyond reasonable doubt that she was involved in the death of her baby. Herein are my reasons.

[13] The prosecution submitted, by virtue of the order of the COA, the trial
C judge must have due regards to the findings and rulings of the COA as if those findings and rulings of the COA had been made by the trial judge himself at the close of the case for the prosecution. The prosecution submitted '... it goes without saying that the Court of Appeal had agreed with the prosecution that both accused persons were present at the crime scene ie at Lereng Bukit, Jalan
D Ladang Alamwasa Sdn Bhd, Suai, Batu Niah, Miri, Sarawak on the 26 November 2013 at about 3.30pm and caused the death to the deceased ...'. The prosecution had referred to *Ouseng Sama-Ae v Public Prosecutor* [2011] 4 MLJ 756; [2010] 6 CLJ 416.

E **[14]** The prosecution also submitted on the duty of the accused which is to cast a reasonable doubt on the prosecution case and that the accused are not required to prove his innocence (see *Public Prosecutor v Ho Sek Kong* [2006] 2 MLJ 81; [2006] 5 CLJ 49; *Public Prosecutor v Magendran a/l Mohan* [2005] 6 MLJ 6; [2005] 3 CLJ 592).

F

[15] The defence submitted '... there were no grounds of decision given by the Court of Appeal, as such we are left guessing as to why both Accused were ordered to enter their defence'. The defence went on to submit '... the only reasons for the Court of Appeal to have called upon both Accused to enter their
G defence must be because they were the last persons seen with the child upon their discharge from Miri General Hospital by the Prosecution witness and because of the presence of DNA of the 1st and 2nd Accused on the exhibits recovered from the Child amongst those of other unidentified persons'.

H **[16]** The submission of both the prosecution and the defence is simply this. Since the prosecution's appeal was allowed by the COA, a prima facie case had been made out and therefore both accused are called to enter their defence.

[17] Had the prosecution proven its case beyond reasonable doubt or was
I there a reasonable doubt raised by the accused. I start by stating that there was no direct evidence from witnesses that saw it was the accused who had killed the baby or that they had the baby buried alive which caused his death. In the absence of direct evidence, the prosecution has to resort to adducing circumstantial evidence to discharge its burden.

[18] The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases and that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence leads to an irresistible conclusion that it was the accused who committed the crime (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Jayaraman Velayuthan & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] CLJ 464; [1982] CLJ Rep 130; *Public Prosecutor v Magendran a/l Mohan* [2005] 6 MLJ 6; [2005] 3 CLJ 592; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65; *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36; [1967] 1 LNS 18).

[19] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101 at p 275 Abdoolcader FJ (as he then was) stated as follows:

> Where circumstantial evidence is the basis of the prosecution case, the evidence proved must irresistibly point to one and only conclusion, the guilt of the accused, but in the case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (see *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1979] 1 LNS 36).

[20] In *Chang Kim Siong*, the Federal Court had emphasised that:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[21] In *Karam Singh*, HT Ong FJ stated:

> ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

[22] In *Sunny Ang* the Federal Court noted:

> ... The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — was it accident?

[23] Thomson CJ's comments in *Chan Chwen Kong* were in the following terms:

> ...where the evidence is wholly circumstantial what has to be considered is not only

A the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

B **[24]** So much on the jurisprudence of circumstantial evidence. What then are the circumstantial evidence here? I am of the view they would include: the evidence from the Miri General Hospital ('MGH') which showed the baby was healthy when discharged, but about 48 hours later the baby was found dead buried underneath the soil; PW13 saw and recognised A1 together with a female person carrying something in a 'kain sarong batik' entering Ladang Alamwasa Sdn Bhd (plantation) from the main road facing towards PW13's guard house and then made a right turn to the bushes where the baby was subsequently discovered; ten minutes also, PW13 saw A1 and the female person coming out from the bushes no longer carrying anything walking towards the main road; PW13 discovered the baby buried at the place where A1 and the female person had earlier gone into; green and white clothing (the clothing) printed with words 'UNTUK KEGUNAAN HOSPITAL SAHAJA' were also found wrapping the body of the baby underneath the soil; the DNA analysis conducted confirmed that A1 and A2 were the biological parents of the baby, the DNA of A1, A2 and others were found on the clothing, the DNA of the baby was also detected on the clothing worn by A1 and A2. I will discuss more of this later.

F **[25]** But what is the accused's defence. A1 and A2 did not call any witnesses but both had given their respective unsworn statements. Their unsworn statements are quite similar and having read the same, they are not totally bare denial as alleged by the prosecution. In A1's unsworn statement, he admitted he is the father of the baby due to a consensual sex with A2. After A2 gave birth to the baby, she was discharged from MGH on the 24 November 2013. A1, A2 and the baby then boarded a bus and left MGH around middy also. At Simpang Ngu, Niah, they got off the bus, A1 took the baby from A2 by force as A1 wanted to give the baby for adoption. A1 then disappeared and came back later to where he had left A2 without the baby. Both A1 and A2 were arrested at Ladang Sungai Pandan 4. A2's unsworn statement is this. She and A1 had a consensual sex which led to the birth of the baby. She was discharged from MGH on 24 November 2013 at about 12 midday. She, the baby and A1 then boarded a bus and when the bus reached Simpang Ngu at Niah they got off the bus. A1 told A2 to give up the baby for adoption but A2 disagreed. A1 took the baby by force from A2 and left her. A1 came back after about 20 minutes and told A2, he had given the baby up for adoption to an Indonesian couple. At Ladang Sungai Pandan 4, A1 and A2 were arrested. It is clear that the accused's defence is that they had given the baby to the Indonesian couple for adoption and having done so they did not know what happen to the baby.

[26] What is the status of unsworn statement? The prosecution asked '... is there any value to be attached to their own unsworn evidence?'. The prosecution submitted '... since both accused person didn't have the courage to give sworn evidence from the witness box and also refused to tender their statement recorded by the police during investigation, this honourable court should not give much weight to the unsworn evidence put forward by both accused'. The prosecution also submitted that the unsworn statements of the accused are mere denial and had referred to the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145 (FC) where it was held: '[12] While it is within the appellant's right to give a statement from the dock, that statement must amount to a credible defence. A mere denial does not amount to credible defence'.

[27] The learned counsel had referred to the case of *Public Prosecutor v Cheah Chong Tatt & Anor* [2017] MLJU 579 where it was held as follows:

> As to the value and implications of an evidence given through an unsworn statement from the dock, I can do no better than to cite the judgment of Zulkefli Ahmad Makinudin J (now PCA) in the case of *Public Prosecutor v Mohd Amin Mohd Razali* [2002] 5 CLJ 281. In that landmark case, His Lordship stated the following:
>
> > The position in law is that the right of an accused person to make an unsworn statement from the dock is a substantive right. However we must bear in mind that statement from the dock is not sworn evidence, which can be the subject of cross-examination. Not so much weight can be given to what the accused said in the dock when compared to what the accused would give under sworn evidence. This is so because when a man gives evidence one can cross-examine him and test his evidence and generally have a better opportunity of assessing him. Nevertheless the law is very clear that the court cannot outright reject such evidence. The court must consider it and give it such weight for what it is worth and think fit having regard to the evidence adduced as a whole before the court.

[28] I have read both *Dato' Seri Anwar Ibrahim* and *Mohd Amin Mohd Razali* and what they entail is this, that the 'unsworn statement must amount to a credible defence' and 'the court must consider it and give it such weight for what it is worth and think fit having regard to the evidence adduced as a whole before the court'.

[29] Coming back to the circumstantial evidence, are they of any help to the prosecution? Do they point to the guilt of the accused? There is of course no issue that due to a consensual sexual liaison between the accused, A2 gave birth to the baby at the MGH. I have no doubt that the hospital staffs had wrapped the baby with green and white clothing which had these printed words 'UNTUK KEGUNAAN HOSPITAL SAHAJA'. A1 and A2 had also touched or carried their baby when they were at MGH and also when they were on the bus on the way to Simpang Ngu, Niah as evidence of their DNA on the

clothing. To me this baby that A2 had given birth to at MGH and later found buried was the same baby. But the chemist's report (P42) on DNA also showed other contributors other than the accused. Learned counsel therefore submitted the presence of other contributors supports and corroborates the defence's contention that the Indonesian couple had indeed adopted the baby. Should I therefore accept the defence's contention that due to the presence of other people's DNA on the clothing, the accused had nothing to do with the death of the baby.

[30] The question that may be asked is this. Did A1 really give the baby to the Indonesian couple for adoption? Both accused had stated so in their respective unsworn statements. On reading A2's unsworn statement, it was actually A1 who told A2 that they had to give the baby for adoption. So it was more of A1's decision and he was all out to do it, because when A2 refused, he had taken the baby by force leaving A2 crying. A1 then disappeared and returned after 20 minutes and told A2 that an Indonesian couple had adopted the baby. But here is my concern, A1's statement the baby was given for adoption is made in the unsworn statements. I am of course conscious of *Dato' Seri Anwar Ibrahim* and *Mohd Amin Mohd Razali.* I would have preferred a statement to that effect in A1's cautioned statement. It has been held that an exculpatory cautioned statement represents an accused person's first disclosure of his defence while under investigation. If it contains the necessary particulars that support his innocence, the cautioned statement is the accused's '*Alcontara* notice' and it carries great weight. Investigation must be carried out on the disclosure and the onus is shifted to the prosecution to rebut the same. In *Chukwudi Hassan lwn Pendakwa Raya* [2015] MLJU 847; [2015] 8 CLJ 353, Dato' Abdul Rahman Sebli JCA had this to say: 'If the cautioned statement of the appellant was accepted as true by the trial judge, the appellant was definitely entitled to an order of discharge and acquittal because without the evidence of knowledge, the appellant did not commit any offence'. But there was no cautioned statement tendered here which would support the alleged adoption of the baby by the Indonesian couple. Such necessary weight could have been given to a tendered cautioned statement; they being contemporaneously made.

[31] There is issue on when A2 and the baby were discharged from MGH. PW15 (Marilyn Sahek) and PW14 (Dr Rizal) had testified that A2 and the baby were discharged from MGH on the 24 November 2013. Learned counsel submitted otherwise relying on the testimony of PW8. But in cross-examination PW8 said 25 November 2013 (p 152 NOP) and also 26 November 2013 (p 161 NOP), so which is which. Having analysed the evidence I can rely on the evidence of PW15 and PW14, they had spoken from the records of the hospital. The main issue here is the afternoon of the 26 November 2013. Learned DPP submitted the accused were the last persons to be with the baby. I agree with the learned DPP the accused were the last

persons with the baby only from the time of the discharged from MGH and whilst in the bus up to Simpang Ngu at Niah. Both unsworn statements of the accused support this view. But having alighted from the bus, A1 had taken the baby by force from A2. A1 then disappeared for a good 20 minutes. A1 to me was the last person to be with the baby for the duration of the 20 minutes. Now coincidentally between 3–3.30pm, PW13 who was the security guard of the plantation saw a male and female persons entering the plantation from the main road facing towards the plantation's guard house. PW13 saw the female person carrying something in a 'kain sarong batik'. PW13 saw them made a right turn to the bushes (where the baby was subsequently discovered). After ten minutes also, PW13 again saw these two persons coming out from the bushes walking towards the main road but the female person was no longer carrying anything. PW13 said he recognised the male person as A1 but not the female person. During the ID parade, PW13 had also identified the male person as A1 but not the female person. PW13 also identified A1 at the dock but not A2.

[32] Learned counsel took issue on the PW13's identification of A1 at the crime scene. He said, PW13 had identified some other male as being near the crime scene on 26 November 2013 together with a female person carrying a baby. Learned counsel had referred to the court's observation at p 257 of the NOP that only the figure of a male and female can be observed and not the facial features. But PW13 in his evidence said he could clearly see the male face but not the female (QA5523 and 5527 NOP). PW13 said the distance from the guard house to where the two persons were coming from was about 70 meters (QA 5477 NOP) and when they reached the pond before turning to their right, they were 30–40 metres away from where he was (QA 5483 NOP). It was also in the afternoon that PW13 saw these two persons and the visibility was good from the guard's house. Although I made such observation on the facial features, PW13's evidence was that he could see A1's face clearly. In fact, PW13 saw the two persons emerging from the main road until they turn right and went to the bush. I am of the view PW13 had some good observation of the two persons. It was not a case of a fleeting glance.

[33] When we speak of the identification of an accused person then the '*Turnbull*' guidelines comes into mind. This was discussed at length in the case of *Mohd Razaly Rahmad v Public Prosecutor* [2014] MLJU 1921; [2015] 2 CLJ 574:

> The *Turnbull* guidelines were reformulated into a three step test by the Singapore Court of Appeal in the case of *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR 465 and referred to recently by the Federal Court in the case of *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692 in a passage that bears useful reproduction:
>
> > To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v Turnbull*

[1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33–35 of the judgment:

> Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

[34] In *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR 465, the Singapore Court of Appeal had reformulated the *Turnbull* guidelines into three-step test and they are: (i) whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken; (ii) if so, is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made; and (iii) where the quality of the identification evidence is poor, is there in any other evidence which goes to support the correctness of the identification.

[35] Learned counsel also took issue on the conduct of the ID parade by the police. He said there were defects in the ID Parade that makes it inadmissible or at the very least unreliable. The defence had listed several unsatisfactory issues and they basically relate to the facial features, height, race, complexion and built of the participants of the ID parade; failure to inform the accused to have his lawyer present during the ID parade; failure to record it in P19; duty to record the method of identification in P19; to produce and tender the document which had the writing in pen on it; the statement 'Samada saksi diberitahu untuk megecam suspek dangan menyentuh bahu kedudukan suspek' are absent or not included in P19 which is a standard form for ID parade.

[36] The position of ID parade evidence is well settled. I refer to the following cases. I will start with *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489:

> [33] In *Malkhansingh v State of Madya Pradesh* [2003] Cr LJ 3535 at p 3538, BP Singh J delivering the judgment of the Indian Supreme Court said:
>
> > It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of s 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this court. The facts, which establish the identity of the accused persons, are relevant under s 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by s 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration (see *Kanta Prashad v Delhi Administration* AIR [1958] SC 350); *Valkuntam Chandrappa & Ors v State of Andhra Pradesh* AIR [1960] SC 1340; *Budhsen & Anor v State of UP AIR* [1970] SC 1321 and *Rameshwar Singh v State of Jammu and Kashmir* [1971] 2 SCC 715).

[37] The Court of Appeal in *Nanda Kumar K Kaliapan v Public Prosecutor*

[2015] 2 MLJU 2361; [2015] 2 CLJ 670, held as follows:

> The holding of an ID parade is part and parcel of the investigation process carried out by the police. Evidence given by witnesses through ID parade may be used to corroborate the substantive evidence given in court on identification of an accused as the perpetrator of the crime. In this instance, reference may be made to *Budhsen & Anor v State of UP* [1970] Cri LJ 1149 SC at p 1153 where it was stated:
>
> > ... the ID parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify the persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this, that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence.

[38] In *Arumugam s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73; [1998] 3 CLJ 597 the Federal Court:

> Dua persoalan telah dibangkitkan dalam rujukan ini, iaitu sama ada: (a) pengecaman dari kandang orang salah di mahkamah selepas selang masa yang lama tanpa mengadakan perbarisan cam boleh merupakan dasar yang mencukupi untuk sabitan; dan (b) dalam satu kes yang bersandar semata- matanya pada pengecaman dari kandang orang salah, kegagalan majistret untuk mengarah diri berkaitan dengan keterangan pengecaman visual mengikut garis panduan dalam *R v Turnbull & Ors* [1976] 3 All ER 549 sehingga mengakibatkan sabitan berdasarkan keterangan yang tidak disokong tentang identiti dibatalkan akan membentuk salah laksana keadilan yang substansial.
>
> Pengecaman seorang tertuduh buat kali pertama di perbicaraan mahkamah adalah tidak diingini dan ia merupakan amalan yang baik untuk mengadakan perbarisan cam. Namun demikian, untuk memutuskan bahawa suatu perbarisan cam dalam semua keadaan mestilah dijalankan bagi mengekalkan sabitan adalah terlalu ketat. Maka, ia akan bergantung pada fakta dan keadaan tertentu setiap kes sama ada untuk mengadakan perbarisan demikian.

[39] In *Ong Poh Cheng v Public Prosecutor* [1998] 4 MLJ 8; [1998] 4 CLJ 1, the Court of Appeal held:

> It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. His rejection of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the person who had committed the offences. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted (see p 11D-G); *Arumugam s/o Muthusamy v Public*

Prosecutor [1998] 3 MLJ 73; [1998] 3 CLJ 597 distinguished. A

[40] In *Abdul Rashid bin Abdul Wahab v Pendakwa Raya* [2016] MLJU 956; [2016] 1 LNS 1310; it was held:

> [16] Jika pengecaman dalam perbarisan pengecaman tidak boleh diterima kerana tidak mematuhi garis panduan seperti yang dihujahkan oleh peguambela perayu, Mahkamah masih boleh bergantung kepada pengecaman di dalam mahkamah (dock identification) (*Ong Poh Cheng v Public Prosecutor* [1998] 4 MLJ 8; [1998] 4 CLJ 1). SP2, SP3, SP4 telah mengecam perayu secara positif di dalam mahkamah. B

C

[41] Having read *Low Kian Boon*, *Nanda Kumar*, *Arumugam s/o Muthusamy*, *Ong Poh Cheng* and *Abdul Rashid bin Abdul Wahab*, it is my view that even if the ID parade conducted is unsatisfactory or that it did not follow the guidelines, the court can still relies on dock identification.

D

[42] What then of the notice of alibi? Are the notice of alibi marked as D1 and D2 of any help to the accused? In their alibi the accused are saying that at the time of the alleged offence around 3.30pm on 26 November 2013, they were in a bus on the Miri-Bintulu Road somewhere after Simpang Ngu junction. But the prosecution took issue that the notice of alibi were only served on the prosecution after the COA had ordered the High Court to call the defence accused on the original charge. The prosecution also submitted that there were no names of witnesses mentioned therein in D1 and D2 as who had taken the baby to corroborate the allegation that the accused had given up their baby to this Indonesian couple at Simpang Ngu. The prosecution submitted the defence of alibi raised by both accused at the defence stage is a classic example of afterthought and a recent invention of evidence because the investigation officer (PW18) had testified at the prosecution stage that it was for the first time that he heard of the baby being given for adoption (p 328 of the NOP). It is also the prosecution's submission that from the very beginning of the police investigation this alleged adoption should have been stated in their cautioned statement which should have been tendered as part of their defence. I am entirely in agreement with the prosecution's submission that the alibi of the accused is an afterthought and of not help to the accused. E F G H

[43] From my analysis of the evidence, I therefore have no hesitation to make a finding that the prosecution had proven its case beyond reasonable doubt that it was A1 and the female person that had killed the baby. As for A2, though her DNA was found on the clothing that was to be expected after all she was the baby's mother and she had touched and cuddled her baby. From her unsworn statement, she did not want to give her baby for adoption and A1 had to take the baby by force. She was left alone to cry until A1 came back no longer with the baby. I am also of the view that A2 was not the female person with A1 I

at the crime scene. PW13 did not identify her at the crime scene or at the ID parade and during dock identification.

[44] But could she be roped in under s 34 of the Penal Code. There are many cases decided on s 34. In *Muhammad Isa bin Aris & Anor v Public Prosecutor* [2011] 5 MLJ 342, it was held: '... It is statutorily recognised that if more than two persons intentionally commit a crime together, it is as if each of them committed the crime individually. It falls squarely within the concept of joint liability in committing the criminal offence based on common intention. Thus, an individual accused person is held to be responsible for the criminal acts done by several persons in furtherance of common intention of all irrespective of the role played by each accused person in the perpetration of the offence. It is a question of facts on every case in order to determine the existence of common intention. Section 34 of the Penal Code would bite even if the wrongdoer is absent from the scene of crime'. In *Rex v Vincent Banka & Anor* [1936] 1 MLJ 53, court states: '... there must exist a common intention to commit the crime actually committed and it is not sufficient that there should be merely a common intention to 'behave criminally'.' In *Abu Bakar bin Imam Idris v Public Prosecutor* [1947] 1 MLJ 133b, it was held: '... it is clear to Their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre- arranged plan. But as has often been observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case'. In *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528 the Court Appeal held: '... the crucial ingredient to prove common intention is the existence of pre-concert or pre-planning which may develop on the spot or during the course of commission of the offence. The crucial test is that such plan must precede the act constituting an offence'.

[45] It is therefore clear from those cases referred, that the prosecution must establish that there was a pre-arranged plan to commit a criminal act and that the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan which may develop on the spot or during the course of commission of the offence. The crucial test is that such plan must precede the act constituting an offence. But as often been observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual, thus in most cases such evidence has to be inferred from his act or conduct or other relevant circumstances of the case. It is a question of facts on every case in order to determine the existence of common intention.

[46] Now have the prosecution proven common intention? I do not think so. There is no evidence showing the existence of pre-concert or pre-planning

bearing in mind that the crucial test is that such plan must precede the act constituting an offence. The evidence showed A2 did not want to give her baby for adoption. It was A1 who had taken the baby from A2 by force. The evidence support my view that A1 was identified by PW13 at the crime scene and A1 alone was responsible for the death of the baby.

[47] For the above reasons, I find that the defence put forward by A1 had failed to create any reasonable doubt in the prosecution's case but the prosecution had succeeded in proving its case against A1 as per the charge beyond reasonable doubt at the end of the defence case. I therefore find A1 guilty and convicted as per the charge and I sentenced him to death, to wit to be hanged by the neck till death. In respect of A2 I find that she had raised a reasonable doubt on the charge preferred against her. I therefore acquit and discharge A2 of the said charge.

First accused convicted as per the said charge and sentenced to death; second accused acquitted and discharged of the said charge.

Reported by Dzulqarnain Ab Fatar